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Supreme Court, U.S.
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No. 98-1896

In the

Supreme Court of the United States

October Term, 1998

ROBBIN JACKSON,

Petitioner,

v

HOUSTON COUNTY BOARD OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

William R. Jerles, Jr.
Counsel of Record
Daniel, Lawson,
Tuggle & Jerles, LLP
912 Main Street
Post Office Box 89
Perry, Georgia 31069-0089
(912) 987-2622
Attorneys for Respondent

Wright/Curry & Taylor Appellate Services

3088

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I

STATEMENT OF THE CASE

This race discrimination action was filed by Petitioner, Robbin Jackson (hereinafter "Jackson"), in the United States District Court for the Middle District of Georgia, on April 26, 1996 with a timely answer being filed by the Respondent, Houston County Board of Education (hereinafter the "Board"), on May 10, 1996. A scheduling and discovery order was entered by the court on June 24, 1996. Discovery was to be complete on November 12, 1996. Jackson filed a motion for preliminary injunction on September 30, 1996. After response by the Board of Education, the court entered an order on November 13, 1996 denying Jackson's motion. Reconsideration of the motion was denied by the court by order filed December 12, 1996. The Board filed a Motion for Summary Judgment on December 10, 1996 along with its memorandum and supporting affidavits. After the Jackson's response, the court entered an order on April 16, 1997 partially granting Summary Judgment, and another order was issued denying the Board's Motion for Summary Judgment on June 26, 1997.

On July 3, 1997 the Board submitted a second Motion for Summary Judgment along with memorandum and statement of undisputed material facts and supporting affidavits. After response by Jackson to the Board's second Motion for Summary Judgment and filing by Jackson of a Motion for Reconsideration of the court's order granting the Board partial summary judgment, the trial court entered an order on August 6, 1997 denying Jackson's Motion for Reconsideration of the Court's Order granting Partial Summary Judgment in favor of the Board and also denying Jackson's previously filed Motion for Contempt of Court. On September 3, 1997, the trial court granted the Board's second Motion for

Summary Judgment and entered judgment in favor of the Board dismissing in total Jackson's race discrimination action.

The decision of the trial court granting summary judgment for the Board was affirmed by the United States Court of Appeals for the Eleventh Circuit on January 11, 1999. Rehearing was denied on February 22, 1999.

STATEMENT OF FACTS

The Houston County School System is a political subdivision of the State of Georgia whose Board is vested with full management and control of the school system under the laws and the Constitution of the State of Georgia. The school system is monitored by the EEOC for its racial makeup through biannual reporting. Record Vol. II- 33. All employees of the school system are compensated on the state merit system pay scale. *Id.* Employees are given increases in pay for years of experience credited and advanced degrees obtained. *Id.* The school system has no discretion as to the state base pay scale. O.C.G.A. §20-2-212. The Houston County School System does pay a local supplement to many of its employees and said supplement is position specific and consistent across all positions in the system for equal positions. Record Vol. II-33.

The State of Georgia certifies individuals who apply for professional teaching positions. *Id.* Jackson had at the time of this action only a business education certificate on the high school level, grades seven through twelve, focusing on computers, typing and data processing. *Id.* For Jackson to become a full time teacher in the middle school, he would

have to obtain a provisional accelerated teaching certificate. *Id.*

Jackson is a forty-three year old black male who graduated from high school in 1971 and from Fort Valley State College in 1975 with a business education degree. Record Vol. I-10 at 11. Subsequently, Jackson worked for the Kellwood Company for 19 ½ years. *Id.* at 14. During Jackson's employment tenure with Kellwood Company, he intermittently was employed by the Board as a substitute teacher. *Id.* at 13-14. Jackson was terminated from his employment with the Kellwood Company on June 5, 1991. *Id.* at 14. He subsequently became employed by the Board as a permanent substitute teacher at Perry Middle School on February 16, 1994. Record Vol. 2-34. Permanent substitutes are not necessarily state certified employees and are not issued a contract of employment. Record Vol. 2-33.

On April 2, 1996, the Board was presented with a preliminary budget summary which showed there would be a budget deficit of approximately $3,224,054.00 due to the addition of two new middle schools and associated staff and unprecedented gain in student population. Record Vol. I-13. It was the decision of the Board to make up the deficit through a combination of personnel cuts, other budget cuts, and an increase in the ad valorem tax levy. *Id.* The position of permanent substitute teacher was eliminated school system-wide as it was not a state funded position nor was it mandated by the State of Georgia. *Id.* Jackson was discharged from his employment as a result of this reduction in force. *Id.* Of the twenty-seven (27) permanent substitutes displaced by the elimination of the permanent substitute position, twenty-five (25) were white and two (2) were black. Record Vol. I-13.

Jackson was interviewed for teaching positions at Perry Middle School during the 1994-95 school year. Record Vol. II-34. In each case Jackson was interviewed by a team of school staff in a competitive environment by a panel made up of instructional coordinators and teachers in the subject area. *Id.* Jackson interviewed for an exploratory computer position in May of 1994. Record Vol. I-10 at 24; Record Vol. II-16; *and* Record Vol II-34. Three people were interviewed. Two of the applicants were black and one was white. *Id.* The committee conducting the interviews had a black female on the committee, Mrs. Lumpkin. Record Vol. I- 10 at 5. Jackson scored the lowest of all of the applicants. Record Vol. II-34. A black female, Brenda Lee, was hired. *Id.*

In August of 1994, Jackson interviewed for a speech journalism exploratory teacher position. Record Vol. I-10 at 25-26 *and* Record Vol. II-34. There were six persons interviewed. The committee also included one black female, Mrs. McGhee. Record Vol. II-34. Again, Jackson scored the lowest of all applicants. *Id.*

Jackson was also interviewed for a science position at Perry Middle School. *Id.* The position was vacated when the teacher holding that position, Mrs. Little, was tragically killed in an automobile accident. *Id.* Jackson was afforded an interview to fill Mrs. Little's position. Jackson was not hired. The individual hired had a strong science background and scored the highest in the interviews. *Id.* The individual hired, Mr. Cedric Rumph, was a black male. *Id.*

Jackson has had prior problems conducting himself appropriately while employed as a permanent substitute at Perry Middle School. *Id.* Jackson had directives written to

him with regards to the improper denial of bathroom privileges to students. *Id.* He had difficulty with the Perry Middle School administration in that he was confrontational when told he was not to attend meetings for contractual full time staff, and he had a physical altercation with a student. *Id.*

SUMMARY OF ARGUMENT

Jackson's petition for writ of certiorari does not present compelling reasons for granting certiorari as required by Rule 10 of the Rules of the Supreme Court of the United States, and his petition only asserts erroneous factual arguments and the misapplication of a properly stated rule of law which does not warrant the granting of his petition.

The lower courts did not err in granting the employer's first and second motions for summary judgment notwithstanding the fact that the Board objected to and did not respond to four of Jackson's requests for production of documents.

Jackson's petition should be denied because he failed to carry his initial burden of establishing a prima facie case of discrimination.

The lower courts did not err in granting the employer's first and second motions for summary judgment because Jackson failed to establish a factual showing of discrimination in regard to his claims of disparate impact, disparate treatment, and claims under U.S.C. §1981.

This Court should deny Jackson's petition because Jackson's brief to this Court is void of any citation of authority or citation to the record of the District Court.

ARGUMENT

I. JACKSON'S PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT COMPELLING REASONS FOR GRANTING CERTIORARI AS REQUIRED BY RULE 10 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES, AND HIS PETITION ONLY ASSERTS ERRONEOUS FACTUAL FINDINGS AND THE MISAPPLICATION OF A PROPERLY STATED RULE OF LAW WHICH ALSO DOES NOT WARRANT THE GRANTING OF HIS PETITION

The first assertion of error that Jackson makes in his brief to this Court is that the District Court erred in not forcing the Board to "turn over important documents that I [Jackson] need to win this case." Petitioner's Brief at 3. The Board timely objected to the production of the documents that Jackson requested. (Defendant's Answers to First Request to Produce Documents were omitted from the District Court Index). No motion to compel the production of the documents was ever filed by Jackson. Only after the discovery deadline of November 12, 1996, as set forth in the Scheduling/Discovery Order of June 24, 1996, did Jackson file a Motion for Contempt of Court by the Defendant. Record Vol. II-38. That motion was subsequently denied by the District Court. Record Vol. 2 at 38 and 42.

In the unpublished opinion of the Eleventh Circuit Court of Appeals, the adequacy of the Board's compliance

with Jackson's request for the production of documents was discussed. The first request objected to by the Board was for the race, sex, and payroll records of each Board employee from 1975 to the present. The Court of Appeals found this request to be "unreasonably cumulative or duplicative, or . . . obtainable form some other source that is more convenient, less burdensome, or less expensive." *Jackson v. Houston County Bd. of Educ.*, No. 97-9104, slip op. at 8 (11th Cir. Jan. 11, 1999). The Court of Appeals further found that the District Court did not circumvent the policy underlying discovery by failing to compel the Board to comply with Jackson's request. *Id.* at 8.

As to the partial compliance with the request for documentation of previous employment discrimination charges, the Court of Appeals opined that Jackson was not deprived of "the opportunity to discover information relevant to the summary judgment motion" on this request. *Id.* at 9. Also, as to some of the documents that Jackson sought, only facts that would "overwhelmingly" justify the Board's decision not to hire him would be brought forth, thus making the objection to production even beneficial to Jackson's case. *Id.* at 10.

Jackson is merely objecting to the proper application of a properly stated rule of law by both the District Court and the Eleventh Circuit Court of appeals. This argument falls well below the required showing for granting certiorari according to Rule 10 of the Rules of the Supreme Court of the United States.

II. THE LOWER COURTS DID NOT ERR IN GRANTING THE EMPLOYER'S FIRST AND SECOND MOTIONS FOR SUMMARY JUDGMENT NOTWITHSTANDING THE FACT THAT THE BOARD OBJECTED TO AND DID NOT RESPOND TO FOUR OF JACKSON'S REQUESTS FOR PRODUCTION OF DOCUMENTS

A. The Board adequately responded or objected to Jackson's Request for the Production of Documents, and there were no material factual disputes in relation to the documents sought to be discovered.

The Board responded with valid responses or objections to Jackson's request to produce certain documents in that the documents requested were either (1) overly broad and burdensome, (2) provided for and not explored by Jackson, (3) did not present a genuine issue of material fact, or (4) overwhelmingly justified the Board's decision not to hire him. *Jackson v. Houston County Bd. Of Educ.*, No. 97-9104, slip op. at 8-10 (11th Cir. Jan. 11, 1999). "[W]here the outstanding discovery could not create factual disputes, summary judgment will stand despite the district court's failure to rule upon the plaintiff's discovery requests." *Id.* at 7-8; *see also Nat'l Union Fire Ins. Co. Of Pittsburgh v. Sahlen*, 999 F.2d 1532, 1537 (11th Cir. 1993). Because the Board adequately responded or objected to Jackson's request for the production of documents where possible and necessary and no material factual dispute existed in reference to the documents sought, petitioners writ should be denied.

B. The period for discovery had expired and the Board had already provided relevant discovery materials.

Jackson's first requests for the production of documents were timely responded to or objected to on June 24, 1996. On the same day, June 24, 1996, a Scheduling/Discover Order was issued by the District Court. It ordered that the discovery period end on November 12, 1996. Record Vol. I-6. (Plaintiff's First Request for Production of Documents was omitted from the District Court Index). Jackson then filed a second request for the production of documents on July 3, 1996, requesting the same documents that were requested in the first request for production of documents. Record Vol. I-8. This second request was not responded to because it had been adequately responded to on June 24, 1996. Jackson's third request for the production of documents was filed on July 11, 1997, well after the November 12, 1996 deadline set for by the Scheduling/Discovery Order of June 24, 1996. Record Vol. II-41 *and* Record Vol. I-6. The Court of Appeals for the Eleventh Circuit has upheld a district court's decision not to allow additional time for discovery before summary judgment because the period for discovery had expired and defendant had already provided relevant discovery materials. *Sec Florida Power & Light v. Allis Chalmers Corp.*, 893 F.2d 1313, 1316 (11th Cir. 1990). According to the Eleventh Circuit Court of Appeals, the Board substantially complied with Jackson's discovery requests; therefore, Petitioner's writ should be denied. *Jackson v. Houston County Bd. of Educ.*, No. 97-9104, slip op. at 10 (11th Cir. Jan. 11, 1999).

III. JACKSON'S PETITION SHOULD BE DENIED BECAUSE HE FAILED TO CARRY HIS INITIAL BURDEN OF ESTABLISHING A PRIMA FACIE CASE OF DISCRIMINATION

The standard of review that the Eleventh Circuit applies to similar cases has been outlined in the case of *Harris v. Shelby County Board of Education*, 99 F.3d 1078, 1083 (11th Cir. 1996):

> First, the plaintiff has the burden of establishing a prima facie case of discrimination. *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824. Second, assuming that the plaintiff has met this initial burden, the defendant has the burden to produce a "legitimate, nondiscriminatory reason" for the allegedly discriminatory employment action. *Id.* Third, if the defendant satisfies this burden of production, the plaintiff has an opportunity to prove by a preponderance of the evidence that the reasons offered by the defendant are a mere pretext for discrimination, and to persuade the fact-finder that the defendant intentionally discriminated against the plaintiff. *Id.* at 804, 93 S.Ct. at 1824. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

Harris, 99 F.3d at 1083. In this case, Jackson failed to even carry the initial burden of establishing a prima facie case of discrimination. Even if Jackson could meet this initial burden, the Board has produced adequate evidence of a "legitimate, nondiscriminatory reason" for its employment action. The evidence of legitimate, nondiscriminatory reasons includes the fact that Jackson was consistently evaluated by multiracial Board hiring committees who consistently scored him lower than all other black and white applicants. Record Vol. II-34 at Exhibit A, B and C. Also, Jackson's failure to present any substantiated proof of a mere pretext for discrimination would make it impossible for him to overcome the Board's "legitimate, nondiscriminatory reason" for its employment action.

Jackson has not carried his initial burden of establishing a prima facie case of discrimination, nor has he presented a compelling reason for this Court to grant his petition.

IV. THE LOWER COURTS DID NOT ERR IN GRANTING THE EMPLOYER'S FIRST AND SECOND MOTIONS FOR SUMMARY JUDGMENT BECAUSE JACKSON FAILED TO ESTABLISH A FACTUAL SHOWING OF DISCRIMINATION IN REGARD TO HIS CLAIMS OF DISPARATE IMPACT, DISPARATE TREATMENT, AND CLAIMS UNDER U.S.C. §1981

A. The *McDonnell Douglas* Test.

In order to establish a prima facie case of disparate treatment under Title VII, Jackson must have met the four part test set forth by the this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as well as the

requirements set forth in its progeny. The prima facie case set forth in *McDonnell Douglas* is as follows:

> (i) that he belongs to a racial minority;
> (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; and,
> (iii) that, despite his qualifications, he was rejected; and,
> (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

In order for Jackson to have established a prima facie case of disparate impact, Jackson must have shown:

(1) that the Board employed a facially neutral employment practice that had a significant discriminatory impact; and

(2) it was the application of that specific employment practice that caused the adverse action. *MacPherson v. University of Mantevalla*, 922 F.2d 766 (11th Cir. 1991); *Hill v. Seaborne Coast Line Railroad Company*, 885 F.2d 884 (11th Cir. 1990).

The "significant discriminatory impact" may be established by statistical evidence indicating that a particular employment practice has had a disproportionate affect on a protected group. Jackson must have isolated and identified the specific employment practices that are allegedly

responsible for any observed statistical disparities. *Hill* 885 F.2d at 812.

With regards to Jackson's 42 U.S.C. 1981 claim, Jackson was required to prove that the Board intentionally discriminated against him to establish liability under the statute, and proof of a disparate impact alone is insufficient. *General Bldg. Contractors Assoc. v. Pennsylvania*, 458 U.S. 375 (1982). Jackson must have presented sufficient evidence to convince a reasonable jury to conclude that the Board's actions were motivated by racial considerations. *Smith v. Firestone Tire and Rubber Company*, 875 F.2d 1325 (7th Cir. 1989).

B. Jackson failed to meet the *McDonnell Douglas* Test.

It is the Board's contention that Jackson failed to set forth any facts showing discrimination with regards to claims of disparate impact, disparate treatment, and Section 1981.

Assuming the Court found Jackson made a prima facie case under *McDonnell Douglas*, supra., Jackson did not rebut the Board's legitimate non-discriminatory reasons for its employment action. When asked what evidence he had to support his complaint with regards to preferential treatment of females, Jackson was unable to articulate or demonstrate any objective basis for the allegation. Record Vol. I-10 at 32. When questioned concerning his complaint regarding the disparity of working conditions for white and black workers, Jackson again could not articulate or demonstrate any objective evidence to support his allegation. *Id.* at 33. In deposition, the only discriminatory working condition that he could point out was the following: "Going to buildings in which

there is much rain on the outside, when there is rain condition, and you really didn't have no other choice but to go into those conditions." *Id.* at 33-34. But certainly rain would effect all Board employees, regardless of race or gender.

When asked on deposition what system of discrimination Jackson contended to exist, Jackson could not articulate any pattern or practice of the Board which resulted in any discriminatory impact. *Id.* at 17. Further, Jackson has not identified any specific employment practice which caused an alleged disparity, nor pointed out any statistical disparities. Jackson's sole basis for his claim is that he is black and he was not hired for a full time teaching position. *Id.* at 18-20. When Jackson was asked what evidence he had that any individual employed by the Board failed to hire him on the basis of his race, his response was "well, that's the only thing which I see". *Id.* at 22.

In three interviews with Board schools for teaching positions that Jackson participated in, he was consistently evaluated by both black and white members of the interview committees. Record Vol. II-34 at Exhibit A, B and C. Jackson consistently scored lower than all other applicants. *Id.* Two of the three positions that Jackson interviewed for were filled by black educators, one male and one female, which is prima facie evidence that Jackson was not discriminated against on the basis of sex or race. Record Vol. I- 10 at 25-26 *and* Record Vol. II-34. While Jackson may be minimally qualified to be a teacher, interviews by educators, both black and white, in a competitive hiring process have consistently found Jackson without the level of teaching skills that equal or exceed those of other black or white applicants. It is the duty of all involved in the hiring process to recommend to the Board the best qualified applicant for available positions.

Jackson also had classroom management problems which are set forth in the above factual statement and detailed by the Affidavit of Bobby Pennington. Record Vol. II-34 at 2. Jackson has a history with the system that reflects negatively on his potential to be an effective classroom teacher who could develop and convey a curriculum to his students. These problems and the fact that Jackson consistently scored below all other applicants for the positions for which he interviewed, demonstrate legitimate, non-discriminatory and objective reasons for Jackson not being hired by the Board. *Evans v. McClain of Georgia*, 131 F.3d 957 (11th Cir. 1997).

V. THIS COURT SHOULD DENY JACKSON'S PETITION BECAUSE JACKSON'S BRIEF TO THIS COURT IS VOID OF ANY CITATION OF AUTHORITY OR CITATION TO THE RECORD OF THE DISTRICT COURT

Jackson has pointed this Court no authoritative support for his argument nor to anything in the record which would raise any genuine issue of material fact regarding intentional discrimination or any pretextual motive. Petitioner's Brief. Without citation of authority or citation to the record, inter alia, Jackson fails to present the required "compelling reasons" for granting of his petition as required by Rule 10 of the Rules of the Supreme Court of the United States.

Furthermore, Jackson has failed to show a split in the United States Court of Appeals on an issue in this case, that a state court of last resort has decided an important federal question in a way that conflicts with another state court or United States Court of Appeals, or that an important question of federal law has not been settled. Not making the above

listed showings is further indication, according to Rule 10 of the Rules of the Supreme Court of the United States, that Jackson's petition is not worthy of being granted.

Therefore, Jackson's Petition should be denied.

CONCLUSION

For the above and foregoing reasons, the petition of Robbin Jackson should be denied.

Respectfully Submitted,
WILLIAM R. JERLES, JR.
Attorney for the Houston
County Board of Education
Georgia State Bar No. 391428

Daniel, Lawson, Tuggle
& Jerles, LLP
912 Main Street
Post Office Box 89
Perry, Georgia 31069
912/987-2622